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IN THE

# Supreme Court of the United States

OCTOBER TERM, [redacted] 1959

No. 640

LENA S. TILLMAN, Administratrix of the Estate of James A. Tillman, Deceased, 160 Remington Place, New Rochelle, New York,

Petitioner,

*vs.*

ROBERT B. ANDERSON, Secretary of the Treasury, Department of the Treasury, Washington, D. C.

*and*

PEARL CARTER PACE, Chairman, THOMAS W. S. DAVIS, Commissioner, and ROBERT L. KUNZIG, Commissioner, of the Foreign Claims Settlement Commission of the United States, Tariff Commission Building, Washington, D. C.,

Respondents.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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# INDEX

PETITION:


| | PAGE |
|---|---|
| Opening | 1 |
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statement | 4 |
| Errors of the Court of Appeals | 8 |
| REASONS FOR GRANTING THE WRIT: | |
| Federal statutes deny power to refuse plenary hearing to appeals for alleged lack of merit | 10 |
| District Court and not Court of Claims had jurisdiction | 12 |
| Congress cannot deprive Federal Courts from control over violations of constitutional guarantees by government or its agencies | 13 |
| U. S. Constitution prohibits seizure of private property without compensation and not for public use | 14 |
| U. S. Constitution prohibits the executive from meddling with State judgments | 16 |
| Cases cited in the opinion below are irrelevant to the issues on the appeal | 18 |
| Verification | 19 |
| PAPERS IN THE COURT OF APPEALS: | |
| Appellee's Motion Based on Alleged Lack of Merit | 29 |
| Objections of Appellant | 32 |
| Order Granting Motion | 37 |
| Appellant's Motion for Reconsideration | 38 |
| Order Denying Reconsideration | 42 |
| Opinion of the Court of Appeals | 43 |

## Table of Cases


| | Page |
|---|---|
| Ackermann v. Tobin, 22 F. 2d 541 | 4 |
| Altman & Co. v. United States, 224 U. S. 583 | 13 |
| Amory v. Amory, 91 U. S. 356 | 11 |
| Armstrong v. Levan, 109 Pa. 177, 1 Atl. 204 | 23 |
| Asakura v. Seattle, 265 U. S. 332 | 15 |
| Bernhardt v. Polygraphic Co., 350 U. S. 198; 76 S. Ct. 273 | 15 |
| Bradley v. Pace, 183 F. 2d 806 | 11 |
| Chicago and Southern Airlines v. Waterman Steamship Corporation, 333 U. S. 103 | 17 |
| City of Bristow v. Groom, 194 Okla. 384; 151 Pac. 2d 936 | 17 |
| Cooper v. Reynolds, 10 Wall. 308 | 17 |
| Davis v. Davis, 305 U. S. 32 | 16 |
| Everlasting Development Corporation v. Descartes, 95 Fed. Supp. 954; 192 F. 2d 1, cert. den. 342 U. S. 954 | 14 |
| First National City Bank of New York v. Gilliland, 103 U. S. App. D. C. 219; 257 F. 2d 223, certiorari denied, 79 S. Ct. 61 | 5 |
| Fox v. McGrath, 152 F. 2d 616 | 17 |
| Geofroy v. Riggs, 133 U. S. 258 | 15 |
| Guaranty Trust Company v. United States, 304 U. S. 126 | 15 |
| Haddock v. Haddock, 201 U. S. 562; 26 S. Ct. 525 | 16 |
| Heikkinen v. United States, 355 U. S. 273 | 23 |
| Horner v. United States, 143 U. S. 570 | 15 |

PAGE

Knowles v. Hirsch, *et al.*, 65 F. Supp. 690 ..... 14

Lehigh Valley R. R. Co. v. State of Russia, 21 F. 2d 396 ..... 15

Lichter v. United States, 334 U. S. 742; 68 S. Ct. 1294 15

O'Donoghue v. United States, 289 U. S. 516; 53 S. Ct. 740 ..... 17

Opinion of Justices, 302 Mass. 605; 19 N. E. (2d) 807 17

Prevost v. Greneaux, 60 U. S. 1 ..... 15

Quirin, *Ex Parte*, 317 U. S. 1, 63 S. Ct. 2 ..... 15

Rainey v. United States, 232 U. S. 310 ..... 15

Rhodes v. City of Asheville, 230 N. C. 759; 53 S. E. (2d) 313 ..... 17

Riggs v. Pursell, 74 N. Y. 370 ..... 17

Rooker v. Fidelity Trust Co., 263 U. S. 413 ..... 12

St. Joseph Stockyards Co. v. United States, 298 U. S. 38 ..... 14

Seeman v. United States, 40 F. 2d 88 ..... 9, 12

State of Russia v. National City Bank, 69 F. 2d 44 ..... 15

Steingut, *et al.* v. Guaranty Trust Company, 58 Fed. Supp. 623; affirmed 161 F. 2d 571; C. C. A. 2d (1947) .....

Thomas v. Gay, 169 U. S. 264 ..... 15

Titus v. Wallick, 306 U. S. 282; 59 S. Ct. 557 ..... 17

Todok v. Union State Bank, 281 U. S. 449 ..... 15

United States v. Belmont, 301 U. S. 324 ..... 15

United States v. Nudelman, 207 Fed. 2d 109 ..... 9, 12

United States v. Pink, 315 U. S. 203 ..... 13

## Other Authorities

PAGE

Constitution of the United States:

Articles II, III, IV; Amendment V ..... 3, 7, 8, 9, 16, 17

Corpus Juris, Vol. 4, pages 574-5 ..... 11

Corpus Juris Secundum, Vol. 5, pages 483, 487 .... 11

Establishment of Diplomatic Relations with The Union of Soviet Socialist Republics, Publication 528, Department of State, 1948 (Reprinted) .. 5

Federal Rules of Civil Procedure 57 ..... 2

Federal Rules of Civil Procedure 73 ..... 2, 8, 9, 20

Journal of American Bar Association (March, 1958, p. 231, September, 1958, p. 831 and December, 1959, p. 1257) ..... 11

Public Law 285, Act of August 9, 1955, Section 4 .... 21

Section 301 ..... 22

Section 302 ..... 4, 6, 23

Section 305 ..... 6, 8, 9, 16, 18, 24

Section 310 ..... 23

Roosevelt-Litvinov Agreement ..... 27, 28

Stat. (53), 1199 ..... 5

Stat. (68), 1279 ..... 2

Stat. (69), 562, 571, 572, 672 ..... 5, 14

U. S. Code—Title 5, Section 1009 ..... 2

—Title 22, Sections 1621-27, 1641 a, 1641 d, 1641 i, 1641 m ..... 3, 4, 5, 13, 14

—Title 28, Sec. 46(c) ..... 8, 10, 13, 20

—Title 28, Sections 2201, 2202, 1291, 1331, 1502, 1254(1) ..... 2

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No. .....

LENA S. TILLMAN, Administratrix of the Estate of James A. Tillman, Deceased, 160 Remington Place, New Rochelle, New York,

Petitioner,

*vs.*

ROBERT B. ANDERSON, Secretary of the Treasury, Department of the Treasury, Washington, D. C.

*and*

PEARL CARTER PACE, Chairman, THOMAS W. S. DAVIS, Commissioner, and ROBERT L. KUNZIG, Commissioner, of the Foreign Claims Settlement Commission of the United States, Tariff Commission Building, Washington, D. C.,

Respondents.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Lena S. Tillman, Administratrix of the Estate of James A. Tillman, deceased, respectfully re-

quests that a writ of certiorari issue to review the orders dismissing the appeal on motion of respondents and denying a reconsideration entered in the above entitled case on October 30 and December 11, 1959 (App. 37, 42), which affirmed the summary judgment order of the District Court for the District of Columbia (R. 59) dismissing the complaint.

## Opinions Below

The opinion of the Court of Appeals has not been officially reported but is printed in the appendix herein (App. 43). There was no opinion in the District Court.

## Jurisdiction

The order of the Court of Appeals dismissing the appeal on motion of the respondents was entered on October 30, 1959 and reconsideration denied on December 11, 1959 (App. 37, 42). The jurisdiction of this court is invoked under 28 U. S. C., Section 1254(1).

The jurisdiction of the Court of Appeals was invoked under 28 U. S. C., Section 1291.

The jurisdiction of the District Court was invoked under U. S. C. 5, Section 1009, and 28 U. S. C., Sections 1331, 2201 and 2202, and Rule 57 of the Federal Rules of Civil Procedure.

## Questions Presented

1. Whether the Court of Appeals has power under Rule of Civil Procedure 73 to dismiss *on the merits* an appeal seasonably and regularly taken without argument and the reply brief, thereby discriminating between appellants in regard to the right of proper presentation of the appeal, and ignoring due process and practice by other Courts of Appeal.

2. Whether the District Court for the District of Columbia or the United States Court of Claims has jurisdiction of this cause, which arises from the Act of Congress of August 9, 1955 (22 U. S. C., Sec. 1621, *et seq.*), purporting to put in effect some of the provisions of the Roosevelt-Litvinov Agreement and Assignment of November 16, 1933 in the light of 28 U. S. C., Section 1502, which denies jurisdiction to the Court of Claims over a claim "growing out of or dependent upon any treaty entered into with foreign nations."

3. Whether petitioner is entitled to just compensation for property subject to her liens taken by the U. S. Government under the provisions of the Roosevelt-Litvinov Agreement of November 16, 1933, and thereafter held for distribution to other American nationals under the provisions of Sections 302 and 305 of the Act of August 9, 1955 (Secs. 1641a and 1641d; Title 22, U. S. C., 69 Stat. 571, 572).

4. Whether Fifth Amendment to U. S. Constitution of the United States prohibits U. S. Government, acting through Congress or respondent Foreign Claims Settlement Commission, from taking property subject to petitioner's liens not for public uses but for the benefit of other American citizens.

5. Whether Congress can vest judicial functions in an administrative agency by conferring upon it the power to review State judgments, in the light of Articles II and III of U. S. Constitution, providing for the separation of executive and judicial functions of the Government, and of the Full Faith and Credit clause of Article IV thereof.

6. Whether Congress has the power to deprive Federal Courts of the right and duty to consider and prohibit violations of U. S. Constitution by administrative agencies of the Government.

7. Whether aforementioned Section 305 of the Act of August 9, 1955 (Sec. 1641d, Title 22, U. S. C.) is unconstitutional insofar as it is claimed by respondents that it authorized said Foreign Claims Settlement Commission to review grounds and merits of the judgment and the attachment writ granted to petitioner's decedent by the New York Supreme Court.

## Statement

1. James A. Tillman, an American citizen from 1916 until his death in 1950, brought suit in the Supreme Court of the State of New York against the Russo-Asiatic Bank, a Russian corporation, to recover $188,408.00, and on August 22, 1927 procured a warrant of attachment in that amount from that Court, and on August 24, 1927 levied under it against the Guaranty Trust Company and the National City Bank of New York, which at that time were indebted to said Russo-Asiatic Bank in a sum in excess of $4,000,000 (R. 4).

2. After much litigation in the State and Federal courts, where the action was removed, Tillman finally recovered, on remand, in the Supreme Court of New York, judgment against Russo-Asiatic Bank on September 23, 1935 for $210,675.05 (R. 5-19-21).

3. In 1935, the Supreme Court of New York appointed receivers over the Russo-Asiatic Bank, and in 1953 the receivers paid to the petitioner $10,000.00 as her aliquot share of the funds collected by them, pursuant to New York statute permitting payment only to creditors with *valid attachments* (R. 7-9).

Under New York law, a warrant of attachment is not annulled by a judgment, but remains alive until dissolved by order of the court, or is paid (*Ackerman* v. *Tobin*, 22 F. 2d 541, 544).

4. On November 16, 1933, the President of the United States recognized the Soviet Government of Russia, and in this connection the so-called Litvinov Assignment was executed, by which the Soviet Government assigned to the United States all claims which the Soviet Government owned in the United States, preparatory to final settlement of the claims outstanding between the two Governments, and of the claims of their nationals. (*Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics*, Publication 528, Department of State, 1948 (Reprinted) (R. 6, 7, 28). As the Soviet Government had theretofore nationalized the Russian banks, it owned or claimed to own deposits carried for the accounts of such banks in the United States, including the deposits held in the Guaranty Trust Company and in the National City Bank of New York for the account of the Russo-Asiatic Bank.

On August 4, 1939, Congress adopted a Joint Resolution appointing a Commissioner for Soviet Claims in the Department of State (53 Stat. 1199), whose functions by the Reorganization Plan No. 1 of 1954 were transferred to respondent Commission (R. 7, 28). Subsequently, in accordance with the Litvinov Assignment, U. S. Government undertook to collect the various amounts so assigned to it, including deposits for Russo-Asiatic Bank. In some instances, litigation was necessary. *Steingut, et al.* v. *Guaranty Trust Company*, 58 F. Supp. 623, affirmed 161 F. 2d 571, C. C. A. 2d, (1947); *First National City Bank of New York* v. *Gilliland*, 103 U. S. App. D. C. 219, 257 F. 2d 223, certiorari denied 79 S. Ct. 61. By 1955, the United States had collected approximately $9,000,000 under the Assignment, including, concededly, $4,368,000.00 of the funds of Russo-Asiatic Bank (R. 9, 29), theretofore held on deposit with said New York banks, and placed the funds in the Treasury on special account (R. 9, 28).

Under Section 302 of the Public Law 285, approved August 9, 1955 (69 Stat. 571; 22 U. S. C. 1641a), a Soviet

Claims Fund so-called was created in the Treasury for coverage into it of funds collected under the Assignment, and by Section 305 of that Public Law the above Commission was directed to receive and determine in accordance with substantive law, including applicable international law, for certification to the Treasury for payment, the validity and amounts of claims of American nationals against the Soviet fund. Two kinds of claims were to be considered, the first comprising claims against the Soviet Government arising prior to November 16, 1933, and the second, claims against Russian nationals whose property in the United States was theretofore attached or against which judgments were obtained by American citizens in American Courts.

5. On March 22, 1956, petitioner, as Administratrix, filed claim with respondent Commission for the sum of $200,497.20, predicated on rights derived from said attachment of August 22, 1927, and levy made thereunder on August 24, 1927 (R. 11, 16, 18), and also derived from said judgment and execution thereof upon the deposits with the Guaranty Trust Company and the First National City Bank of New York (R. 11, 24, 25).

In subsequent hearings before the Commission, petitioner contended that in granting the judgment, the Supreme Court of New York had determined both the validity and amount of her claim, and that such determination was binding on the Commission under constitutional guarantees. However, the Commission held that Section 305(a)(1) of the Public Law entitled it to review the proof and evidence submitted to the New York Supreme Court to obtain the attachment to determine how Tillman's underlying claims were acquired, and accordingly, on November 14, 1956, denied the claim on the ground that it had not been established that the underlying claims had originally accrued to him, although Tillman was unquestionably the original owner of the attachment lien.

In January, 1957 (R. 12, 29, 30), the Commission finally dismissed the claim based on the aforementioned attachment and judgment liens (R. 28-29).

In rejecting the claim, the Commission purported to exercise powers with regard to Tillman's attachment and judgment liens, denied to Congress and to the Commission as an administrative agency, in that

> (a) The Commission claimed the right and authority to examine and review the underlying considerations of the judgment and attachment writ, such action being contrary to Articles II and III of the Constitution of the United States providing for separation of the executive and judicial functions;
>
> (b) The Commission refused to accord Full Faith and Credit to the final judgment of the Supreme Court of New York, as required by Section 1, Article IV, of the Constitution of the United States;
>
> (c) The Commission freed the assets of Russo-Asiatic Bank from the liens to Tillman which had been impressed upon them through the attachment and judgment of the Supreme Court of New York, thereby taking property without just compensation, contrary to Amendment V of the Constitution of the United States; and
>
> (d) The Commission applied assets of Russo-Asiatic Bank, so confiscated from Tillman, not for any public purposes but for payment to other private individuals, also contrary to Amendment V.

6. Both sides moved for summary judgment in the District Court because none of the facts were in dispute, and all the documents relating to the matter were attached to the complaint. (R. 16-21). The District Court granted judgment to respondents and denied judgment to the petitioner on the ground that it had no jurisdiction, because this action should have been brought in the Court of Claims, and

because Congress in enacting the Act of August 9, 1955, expressly legislated that the decisions of the respondent Commission cannot be reviewed either on questions of fact or of law. Of course, the confiscation of the petitioner's lien by the Treasury Department had no relation whatever to the Act of August 9, 1955, relating solely to the Commission, or to anything done by it under said Act (R. 49).

The Circuit Court of Appeals, on a motion for the respondents, summarily affirmed the judgment of District Court on the merits without an opinion (App. 37), and then, on an application for reconsideration, cited its own decisions, holding that no constitutional questions were properly raised by the appellants therein and that it is without power to consider any other error of the Commission. Thus, the Court of Appeals denied the petitioner the right to argue her appeal on the merits, as provided in U. S. C. 28, Chapter 3, Section 46(c); ignored the question of jurisdiction between the District Court and the Court of Claims; the confiscation of petitioner's liens as violating her constitutional rights under the Fifth Amendment of U. S. Constitution; and the assertion of power by the Commission under Section 305 of the Act of August 9, 1955 to review the merits of the attachment and judgment liens granted to petitioner by the New York Supreme Court as contravening the Full Faith and Credit provisions of Article IV and Articles II and III of the U. S. Constitution, providing for the separation of executive and judicial functions of the Government.

## Errors of the Court of Appeals

1. It had no power to dismiss summarily by motion, petitioner's appeal regularly and seasonably taken, *on the merits* in violation of U. S. C. 28, Chapter 3, Section 46(c), and Section 1291, and Rule 73 of Civil Procedure, and its own court rule 19(a). It also created conflict with other

circuits in interpreting said Rule 73 (*Seeman* v. *United States*, 90 F. 2d 88 (Fifth Circuit); *U. S.* v. *Nudelman*, 207 Fed. 2d 109 (Third Circuit)).

2. It erroneously held that Congress has power to deprive Federal Courts of the right and duty to determine violations of the United States Constitution by federal administrative agencies by holding the Commission has power to question the validity of the judgment and the warrant of attachment granted by the New York Supreme Court in determining the amount and the ownership of Tillman's claims against the Russo-Asiatic Bank, thereby fixed.

3. It failed to determine irrespective of the Act of August 9, 1955 and the acts of the Commission thereunder the confiscation by the Treasury Department of Tillman's attachment and judgment liens which were lawfully acquired in New York against the debts due to the Russo-Asiatic Bank, and the application by the Department of these debts not to public use but to payment of private claims of other American citizens against the Soviet Government.

4. It failed to determine the constitutionality of Section 305 of the Act of August 9, 1955, in so far as it allegedly empowered the Commission to review on the merits the acts of the New York Supreme Court in granting attachment and judgment liens to Tillman in the light of Articles II and III of U. S. Constitution, providing for the separation of executive and judicial functions of the Government, and as contravening the Full Faith and Credit provision of Article IV hereof.

5. It failed to determine the effect of the Statute of Limitations on Tillman's claim in the light of the fact that Congress created by the Act of August 9, 1955 a special fund in the U. S. Treasury to cover payment of moneys

due on attachments of American citizens, and that it limited such attachments to those who were procured prior to November 15, 1933, viz.: those that were 22 years old at the time of the enactment of said statute, thereby waiving normal statutory limitations.

## REASONS FOR GRANTING THE WRIT

**The Court of Appeals had no power to dismiss on the merits, by motion, petitioner's appeal, a disposition contrary to Rule 73 of Civil Procedure and in conflict with practice of other Federal Courts of Appeals.**

The petitioner, in bringing her appeal to the Court of Appeals for the District of Columbia Circuit, scrupulously complied with all the requirements as to time and procedure. Respondents agreed with petitioner on a joint appendix, and petitioner printed and seasonably filed her brief and the joint appendix. Thereafter, respondents moved to dismiss the appeal on the merits for lack of a meritorious issue (App. 29). Petitioner filed objections (App. 32-36). On October 30, the Court of Appeals, by an order made in chambers, granted the motion and affirmed the judgment of the District Court (App. 37).

The jurisdiction of the Circuit Court of Appeals is statutory (U. S. C., Sec. 1291). It confers a statutory right upon a litigant to appeal from the judgment of the Distrit Court. U. S. C. 28, Chapter 3, Section 46(c) provides that "Cases and controversies *shall be heard* and determined by a court or division of not more than three judges * * *." Rule 73 of Civil Procedure provides:

> "Failure of the Appelant to take any of * * * steps to secure the review * * * is ground for such action as the appellate court deems appropriate, which may include dismissal of appeals."

This rule was formulated in accordance with the decision of this Court in *Amory* v. *Amory*, 91 U. S. 356, at 357, where Chief Justice Waite delivered the unanimous opinion of the Court, saying at page 357:

> "*Both parties have the right to be heard on the merits, and one party cannot require the other to come to such a hearing upon a mere motion to dismiss.* To dismiss under such circumstances would be to decide that the case had no merits."

Rule 19(a) of the District Court of Appeals provides:

> "The appellant in this court *shall be entitled to open and conclude the case.* The rule is equivalent to statute." (*Bradley* v. *Pace*, 87 App. D. C. 11, 183 F. 2d 806.)

It is clear that Rule 73 permits the dismissal of an appeal without an argument, solely where the appellant fails to take the prescribed steps to bring the appeal on for argument. Where, as in this case, the petitioner complied with all the rules, she is entitled to be heard on the merits in an open court. To allow one appellant the benefit of an oral argument and deny such benefit to other appellants, is to deprive such appellant of equal protection of law and due process thereof. (Compare as to the function of the argument: *Journal of American Bar Association*, March 1958, p. 231; Sept. 1958, p. 831 and Dec. 1959, p. 1257.)

Motions to dismiss for alleged lack of merit cannot be disposed of without considering the merits themselves. The merits are the substance of any appeal to be presented to the Court by both the argument and briefs. Such motions are uniformly denied. (See numerous cases collected in *Corpus Juris Secundum*, Vol. 5, p. 483, Notes 37 and 38 and at p. 487, Note 65; and *Corpus Juris*, Vol. 4, pp. 574-5, Notes 77-79.)

The District Court of Appeals not only assumed in this case a power not conferred on it by Rule 73, but also brought itself in conflict with other Federal Courts of Appeals. Thus, in *Seeman* v. *United States* 40 F. 2d 88, the Court of Appeals for the Fifth Circuit said at page 89:

> "A motion was filed on behalf of the United States *to dismiss the appeal.* As to this, it is sufficient to say that the grounds urged are technical, unsubstantial and not jurisdictional.' The motion is overruled."

And in *U. S.* v. *Nudelman*, 207 Fed. 2d 109, the Court of Appeals for the Third Circuit said at page 110:

> "The United States, Appellee, filed a written motion to dismiss the appeal *because it was without merit. Such a motion cannot be granted since the appeal was directed to the merits.*"

Respondent cited below *Rooker* v. *Fidelity Trust Company*, 263 U. S. 413. In that case, both sides waived argument and submitted the case on consent by way of a motion to dismiss or affirm. The case falls within one of the well-known exceptions to the general rule. It has no application to the petitioner, as she never agreed to any such submission.

*The denial of argument to petitioner should be reversed, and the Court of Appeals should be directed to hear the case in an open court with full argument, as prescribed by statutes and due process of law.*

**The District Court had jurisdiction over petitioner's cause of action.**

Respondents contended in the District Court that it lacked jurisdiction of the action and that it should have been brought in the United States Court of Claims.

Section 1331, Title 28, *U. S. Code*, as amended, is in part as follows:

> "The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arises under the Constitution, laws, *or treaties* of the United States."

The Act of August 9, 1955 (22 U. S. Code 1621, *et seq.*), and the disposition of the Soviet funds, flowed from and were consequent upon the Roosevelt-Litvinov Agreement and Litvinov Assignment of November 16, 1933.

The United States Court of Claims has no jurisdiction over a claim "growing out of or dependent upon *any treaty* entered into with foreign nations" (28 U. S. C. Sec. 1502).

In *United States* v. *Pink*, 315 U. S. 203, 230, this Court stated:

> "A treaty is a 'Law of the Land' under the supremacy clause (Art. VI, Clause 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity."

And in *Altman & Co.* v. *United States*, 224 U. S. 583, 600, this Court held that the word "treaty" in the Circuit Court of Appeals Act includes the commercial agreement entered into by the Federal Government without approval of the Senate.

**Congress has no power to deprive Federal Courts of the right and duty to examine and prohibit violations of the United States Constitution by administrative agencies of the United States Government.**

Respondents contended below that because of the finality provisions of the Act of August 9, 1955 (22 U. S. C. 1641m), the Federal Courts were without authority to review violations of the Constitution of the United States resulting

from decisions and interpretations by respondent Commission. As stated by Chief Justice Hughes in *St. Joseph Stockyards Co.* v. *U. S.*, 298 U. S. 38 (1936), at page 52:

> "Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

In *Everlasting Development Corporation* v. *Descartes*, 95 Fed. Supp. 954, 192 F. 2d 1, cert. den. 342 U. S. 954, it was stated (959):

> "The question of whether it is within the power of a legislative body to circumvent judicial review in cases where an invasion of constitutional rights is asserted, has been the subject of exhaustive examination by the courts, and the decisions unanimously sustain the proposition that legislative bodies are without such power. *Estep* v. *U. S.*, 327 U. S. 114, 66 S. Ct. 423, 567; *Bridges* v. *Wimon*, 326 U. S. 135, 65 S. Ct. 1443, 2103; *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297, 301, 64 S. Ct. 95; *Norton* v. *Cass County*, 5 Cir., 115 F. 2d 884, 886."

Accord, *Knowles* v. *Hirsch, et al.*, 65 Fed. Supp. 690.

**The United States Constitution prohibits the United States Government, acting through Congress or the Treasury Department from seizing Tillman's property to pay private claims of other American citizens.**

The Act of August 9, 1955 (69 Stat. 562, 22 U. S. C. 1621 *et seq.*) is violative of Amendment V to the United States Constitution and therefore unconstitutional, insofar as it directs without compensation and not for public purpose the use of the seized funds to pay unsecured private claims.

As stated hereinabove, James A. Tillman, American citizen, and resident of New York State, obtained in New York Courts liens by a warrant of attachment in his favor in the amount of $188,408.00, plus costs and expenses on the funds of Russo-Asiatic Bank held in New York by the Guaranty Trust Company and the National City Bank of New York, supported by due levies (R. 16-18). The attachment and levies were outstanding and in force on November 16, 1933, the date of the Roosevelt-Litvinov Agreement and Assignment. Accordingly, the United States Government took under the assignment, subject to the attachment and levies. Recognition of the Soviet Government by the United States Government did not affect the existing rights of American nationals in United States Courts against Soviet Property in the United States. (*U. S.* v. *Belmont*, 301 U. S. 324, 335; *Guaranty Trust Company* v. *U. S.*, 304 U. S. 126, 143; *Lehigh Valley R. R. Co.* v. *State of Russia*, 21 F. 2d 396, 401-2, and left "undisturbed diplomatically final non-appealable judgments and decrees of the American courts touching Russian affairs * * *." (*State of Russia* v. *National City Bank*; 69 F. 2d 44, 48.)

Congress has only such powers as are granted to it by the Constitution either expressly or by implication. *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198; 76 S. Ct. 273; *Ex Parte Quirin*, 317 U. S. 1, 63 S. Ct. 2. It may exercise its powers only within the limits of the Federal Constitution. *Lichter* v. *United States*, 334 U. S. 742, 68 S. Ct. 1294. Even a treaty approved by the Senate yields to the command of the Federal Constitution. *Todok* v. *Union State Bank*, 281 U. S. 449, 454; *Prevost* v. *Greneaux*, 60 U. S. 1, 7. An executive agreement such as the Roosevelt-Litvinov Agreement, and the Litvinov Assignment, command no higher power than a Congressional statute. *Rainey* v. *U. S.*, 232 U. S. 310, 316; *Horner* v. *U. S.*, 143 U. S. 570, 578. Neither may authorize that which the Constitution forbids. *Asakura* v. *Seattle*, 265 U. S. 332, 341; *Thomas* v. *Gay*, 169 U. S. 264, 271; *Geofroy* v. *Riggs*, 133 U. S. 258, 267.

**Congress cannot vest judicial functions in the respondent Commission, an administrative agency, or confer upon it the powers to disregard or review State judgments in violation of Articles I, II, III and IV of the United States Constitution and Amendment V thereof.**

The Act of August 9, 1955 is also violative of Section 1 of Article IV of the Constitution of the United States so far as it would deny full faith and credit to the judgments of State Courts.

On September 23, 1935, judgment for $210,497.20 was entered in the Supreme Court for the State of New York in favor of James A. Tillman and against the Russo-Asiatic Bank (R. 24, 25). When the judgment became final, it was, at the instance of Tillman, executed upon the deposits of the Russo-Asiatic Bank held by the Guaranty Trust Company and the National City Bank of New York, which deposits had already been levied upon on August 24, 1927, pursuant to Tillman's warrant of attachment of August 22, 1927 (R. 16-18).

Under New York Law, an attachment lien mergers in the judgment, and is continued in it (*supra*, at p. 4).

Respondent Commission asserted in effect that the Act of August 9, 1955 vested it with the power to recognize liens and judgments in full or in part, and that the determination of the Supreme Court of New York as to the extent and ownership of the liens to Tillman was not binding upon it, and demanded that petitioner present proof as to the origin of the claims underlying the liens and the judgment. Respondent declined to do so, relying on the Full Faith and Credit provisions of Section 1, Article IV of the Constitution. The latter requires full, untrammeled and unabridged credit for State judgments. *Davis* v. *Davis*, 305 U. S. 32, 39; *Haddock* v. *Haddock*, 201 U. S. 562, 26 S. Ct. 525.

In *Chicago and Southern Airlines* v. *Waterman Steamship Corporation*, 333 U. S. 103, it was stated (113):

> "Judgments, within the powers vested in Courts by the judiciary article of the Constitution, may not lawfully be revised, overturned *or refused faith and credit by another department of the Government.*"

Section 305 of the Act of August 9, 1955 is also violative of Articles II and III of the Constitution of the United States, and accordingly unconstitutional, insofar as it purports to confer power on respondent Commission to examine into and determine the merits of state judgments.

The right to review a Court judgment is a judicial function. Articles II and III of the Constitution of the United States provide for the separation of the judicial and executive functions of the Government. Respondent Commission is an agency of the Executive Branch.

The division of powers between Judicial and Executive departments is fundamental, and must be strictly observed. *O'Donoghue v. U. S.*, 289 U. S. 516; 53 S. Ct. 740; *Opinion of Justices*, 302 Mass. 605; 19 N. E. (2d) 807.

Judicial functions cannot be conferred on administrative agencies. *Rhodes* v. *City of Asheville*, 230 N. C. 759; 53 S. E. 2d 313; *City of Bristow* v. *Groom*, 194 Oklahoma 384; 151 Pac. 2d 936.

Under the Full Faith and Credit clause in Article IV of the Constitution, even Federal Courts cannot review substantive or procedural merits of State judgments, other than for fraud or lack of jurisdiction. *Titus* v. *Wallick*, 306 U. S. 282; 59 S. Ct. 557; *Cooper* v. *Reynolds*, 10 Wall. 308; *Fox* v. *McGrath*, 152 F. 2d 616.

To the extent that Section 305 of the Act of August 9, 1955 purports to confer on respondent Commission the right to re-examine Court judgments, it is unconstitutional, because of conflict with the intent and provisions of Articles II and III and IV, Section 1, of the Constitution.

**Cases cited by the District Court of Appeals were not relevant to the issues on the appeal.**

All the cases cited by the Court of Appeals in a memorandum handed down on an application for a reconsideration of its summary disposition of the appeal (App. 43) are its own decisions in which it held that the appeals from the decisions of the Foreign Claims Settlement Commission did not involve constitutional questions and that the Court of Appeals was without power to consider errors of facts made by the Commission or errors of law below, the level of conflicting with the provisions of the Federal Constitution.

This petitioner did not ask the Court of Appeals to consider any errors of fact or of law committed by the Commission in consideration of her claim. She asked to declare that the powers claimed by the Commission under provisions of Section 305 of the Act of August 9, 1955, made said provision unconstitutional as transgressing the prohibitions of Federal Constitution with regard to the division of governmental powers between judicial and executive departments and the finality of state and federal judgments.

The petitioner further asked the Court of Appeals to adjudge her rights under V and VII amendments to the Federal Constitution with regard to her liens to property in New York State as fixed by New York courts and confiscated by the Treasury Department without any compensation for the purpose not of using for public purpose but for distributing the property subject to such liens to other private American citizens.

Upon this application the petitioner further asks this Honorable Court to consider violation of its appellate powers and the federal statutes relating thereto by the Court of Appeals for the District of Columbia in denying her the right of argument before the full court, and deciding the merits of her appeal in a summary manner contrary to the due process of law and the constitutional guarantees of equal protection of law on the alleged ground

that petitioner's appeal is in the opinion of the appellee "not meritorious". We respectfully submit that any appeal may be similarly dismissed in the summary manner, because we do not know any appellee who does not claim and whose duty is not to claim that the appellant's appeal allegedly lacks "a meritorious issue" (App. 29).

Constitutional questions were duly raised and pressed by petitioner in the respondent Commission, the District Court and the Court of Appeals (R. 13, 24-30; J. App. 14-15; App. 34, 35).

Wherefore, your petitioner respectfully prays that because this case involves the correct interpretation of the Rules of Civil Procedure in the light of conflicting decisions of the Circuit Court of Appeals regarding appellate practice, the determination of the jurisdiction of the District Courts and the Court of Claims; important encroachments on the prerogatives of the judiciary by unconstitutional actions of the administrative agencies of the government or the Congress; deprivation of the petitioner of her property liens now worth in excess of three hundred thousand dollars through denial of constitutional guarantees, that the writ of certiorari be granted to her.

Respectfully submitted.

John Wattawa,
Borris M. Komar,
Counsel for Petitioner.

Lena S. Tillman,
Petitioner.

State of New York
County of New York } ss.:

Lena S. Tillman, being duly sworn, deposes and says, that she has read the foregoing petition; and the same is true to her knowledge.

Lena S. Tillman.

Sworn to before me this
January 8, 1960.

William S. Lefkowitz,
Notary Public, State of New York.
(Notarial Seal)

# APPENDIX.

## 1. Statutes and treaties.

28 U. S. C., Chapter 3, Section 46(c):

"Cases and controversies shall be heard and determined by a court or division of not more than three judges * * *"

Rule 73 of Civil Procedure:

"Failure of the appellant to take any of * * * steps to secure the review * * * is ground for such action as the appellate court deems appropriate, which may include dismissal of appeals."

Rule 19(a) of the District Court of Appeals:

"The appellant in this court shall be entitled to open and conclude the case."

**"International Claims Settlement Act of 1949.**
**[Act of March 10, 1950, c. 54, 64 Stat. 12,**
**22 U. S. C. § 1621, et seq.]**

AN ACT

To provide for the settlement of certain claims of the Government of the United States on its own behalf and on behalf of American nationals against foreign governments.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act may be cited as the 'International Claims Settlement Act of 1949'".

* * * * * *

"Sec. 4. * * *

(h) The Commission shall notify all claimants of the approval or denial of their claims, stating the reasons and grounds therefor, and if approved, shall notify such claimants of the amount for which such claims are approved. Any claimant whose claim is denied, or is approved for less than the full amount of such claim, shall be entitled, under such regulations as the Commission may prescribe, to a hearing before the Commission, or its duly authorized representatives, with respect to such claim. Upon such hearing, the Commission may affirm, modify, or revise its former action with respect to such claim, including a denial or reduction in the amount theretofore allowed with respect to such claim.

The action of the Commission in allowing or denying any claim under this Act shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise."

## SOVIET CLAIMS ACT

**"Public Law 285—84th Congress**

**Chapter 645—1st Session**

**[Act of March 10, 1950, c. 54, 64 Stat. 12, 22 U.S.C. § 1621, et seq. as amended by the Act of August 9, 1955, c. 645, 69 Stat. 572, 22 U.S.C. § 1641, et seq.]**

To amend the International Claims Settlement Act of 1949, as amended, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the International Claims Settlement Act of 1949, as amended, is further amended by inserting after the first section thereof the following: 'TITLE I.

SEC. 2. The word 'Act', wherever it appears in title I in reference to the International Claims Settlement Act of 1949, is amended to read 'title'.

SEC. 3. The International Claims Settlement Act of 1949, as amended, is further amended by adding at the end thereof the following:

'TITLE II'

'VESTING AND LIQUIDATION OF BULGARIAN, HUNGARIAN, AND RUMANIAN PROPERTY

[The text of Title II is omitted]

'TITLE III

'CLAIMS AGAINST BULGARIA, HUNGARY, RUMANIA, ITALY, AND THE SOVIET UNION

'SEC. 301. As used in this title the term—

* * * * * *

'(2) "National of the United States" means (A) a natural person who is a citizen of the United States, or who owes permanent allegiance to the United States, and (B) a corporation or other legal entity which is organized under the laws of the United States, any State or Territory thereof, or the District of Columbia, if natural persons who are nationals of the United States own, directly or indirectly, more than 50 per centum of the outstanding capital stock or other beneficial interest in such legal entity. It does not include aliens.

* * * * * *

'(5) "Soviet Government" means the Union of Soviet Socialist Republics, including any of its present or former constituent republics, other political subdivisions, and any territories thereof, as constituted on or prior to November 16, 1933.

'(6) "Litvinov Assignment" means (A) the communication dated November 16, 1933, from Maxim Litvinov to President Franklin D. Roosevelt, wherein the Soviet Government assigned to the Government of the United States amounts admitted or found to be due it as the successor of prior governments of Russia, or otherwise, preparatory to a final settlement of the claims outstanding between the two Governments and the claims of their nationals; (B) the communication dated November 16, 1933, from President Franklin D. Roosevelt to Maxim Litvinov, accepting such assignment; and (C) the assignments executed by Serge Ughet on August 25, 1933, and November 15, 1933, assigning certain assets to the Government of the United States.

'(7) "Russian national" includes any corporation or business association organized under the laws, decrees, ordinances, or acts of the former Empire of Russia or of any government successor thereto, and subsequently nationalized or dissolved or whose assets were taken over by the Soviet Government or which was merged with any other corporation or organization by the Soviet Government.

'(8) "Commission" means the Foreign Claims Settlement Commission of the United States, established pursuant to Reorganization Plan Numbered 1 of 1954 (68 Stat. 1279).

'(9) "Property" means any property, right, or interest.

'SEC. 302. * * * The Secretary shall cover into the Treasury the funds collected by the United States pursuant to the Litvinov Assignment (including postal funds due prior to November 16, 1933, to the Union

of Soviet Socialist Republics because of money orders certified to that country for payment) and shall cover into the Soviet Claims Fund the funds so covered into the Treasury.

* * * * * *

'Sec. 305. (a) The Commission shall receive and determine in accordance with applicable substantive law, including international law, the validity and amounts of—

'(1) claims of nationals of the United States against a Russian national originally accruing in favor of a national of the United States with respect to which a judgment was entered in, or a warrant of attachment issued from, any court of the United States or of a State of the United States in favor of a national of the United States, with which judgment or warrant of attachment a lien was obtained by a national of the United States, prior to November 16, 1933, upon any property in the United States which has been taken, collected, recovered, or liquidated by the Government of the United States pursuant to the Litvinov Assignment. Awards under this paragraph shall not exceed the proceeds of such property as may have been subject to the lien of the judgment or attachment, nor, in the event that such proceeds are less than the aggregate amount of all valid claims so related to the same property, exceed an amount equal to the proportion which each such claim bears to the total amount of such proceeds; and

'(2) claims, arising prior to November 16, 1933, of nationals of the United States against the Soviet Government.

'(b) Any judgment entered in any court of the United States or of a State of the United States shall be binding upon the Commission in its determination, under paragraph (1) of subsection (a) of this section, of any issue which was determined by the court in which the judgment was entered.

'(c) The Commission shall give preference to the disposition of the claims referred to in paragraph (1) of subsection (a) of this section, over all other claims presented to it under this title.

* * * * *

'Sec. 310. (a) The Secretary of the Treasury shall make payments on account of awards certified by the Commission pursuant to this title as follows:

'(1) Payment in full of the principal amount of each award made pursuant to section 305 (a) (1) and each award of $1,000 or less made pursuant to section 303 or 304;

* * * * *

'(3) Payment in the amount of $1,000 on account of the principal of each award of more than $1,000 in amount made pursuant to section 303, 304, or 305 (a) (2);

'(4) After completing the payments under the preceding paragraphs of this subsection from any one fund, payments from time to time, in ratable proportions, on account of the then unpaid principal of all awards in the principal amount of more than $1,000, according to the proportions which the unpaid principal of such awards bear to the total amount in the fund available for distribution on account of such awards at the time such payments are made;

'45) After payment has been made in full of the principal amounts of all awards from any one fund, pro rata payments from the remainder of such fund then available for distribution on account of accrued interest on such awards as bear interest.

* * * * *

'Sec. 314. The action of the Commission in allowing or denying any claim under this title shall be final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise, and the Comptroller General shall allow credit in the accounts of any certifying or disbursing officer for payments in accordance with such action'."

## 2. Litvinov Assignment of November 16, 1933

The Litvinov Assignment* was in the form of a letter, dated November 16, 1933, to the President of the United States from Maxim Litvinov, People's Commissar for Foreign Affairs, reading as follows:

> "Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nations, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.
>
> "The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement

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* See Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, Dept. of State, Eastern European Series, No. 1 (1933) for the various documents pertaining to recognition.

referred to above not to make any claims with respect to:

"(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

"(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof."

This letter was acknowledged by the President on the same date, November 16, 1933. The acknowledgment, after setting forth the terms of the assignment, concluded:

"I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics, and of the amount that may be found to be due on the claim of the Russian Volunteer Fleet."

## 3. Papers in the Court of Appeals.

### Appellee's Motion to Dismiss or Affirm

UNITED STATES COURT OF APPEALS,

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 15,254

---

LENA S. TILLMAN,

Appellant,

*v.*

ROBERT B. ANDERSON, Secretary of Treasury,

Appellee.

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MOTION TO AFFIRM OR DISMISS.

Comes now the appellee, by its attorney, the United States Attorney, and moves that the judgment of the District Court dismissing the complaint for lack of jurisdiction be affirmed or that the appeal herein be dismissed for lack of a meritorious issue.

FACTS

Appellant, as administratrix of her deceased husband's estate, filed a claim against the Soviet Claims Fund. The basis of appellant's claim was alleged to be a certain legal matter instituted in August 1927 by appellant's decedent in a court of the State of New York against the Russo-Asiatic Bank.

After the claim was filed, the Commission requested that appellant present evidence to establish (1) the origin of appellant's claim and the name of the person in whose favor the claim originally arose and all subsequent owners, and their nationality and (2) how and when the claim against the Russo-Asiatic Bank arose. Appellant failed to comply

with the request. The Commission denied appellant's claim by a proposed decision dated August 1, 1956. Appellant filed objections to the proposed decision and a hearing was held. On October 9, 1956, the Commission issued an order providing that unless appellant within 10 days established (1) that the claim originally arose, in whole or in part, *in favor of a national* of the United States, and that a valid attachment lien was obtained prior to November 16, 1933, the Commission would affirm its proposed decision (J. A. 41).

Appellant did file some documentary matter, however, the Commission concluded that these documents did not satisfy the requirement of their order of October 9, 1956, and that eligibility under the act had not been established (J. A. 43). Accordingly, a final decision was entered on November 14, 1956, affirming the proposed decision (J. A. 44).

Appellant instituted this action in the United States District Court for the District of Columbia seeking a declaratory judgment. The complaint was dismissed by Judge Sirica on May 14, 1959, on the ground that the Court lacked jurisdiction over the subject matter.

## Argument

It is well established that the action of the Commission in denying any claim is not subject to review by any court. *First National City Bank of New York* v. *Gillilland, et al.*, 103 U. S. App. D. C. 219, 257 F. 2d 223 (1958); *American and European Agencies, Inc.* v. *Gillilland, et al.*, 101 U. S. App. D. C. 104, 247 F. 2d 95 (1957), *cert. denied* 355 U. S. 884; *DeVegvar* v. *Gillilland, et al.*, 97 U. S. App. D. C. 126, 228 F. 2d 640 (1955), *cert. denied*, 350 U. S. 994.

The International Claims Settlement Act provides that a decision of the Commission shall be final and conclusive on all questions of law and fact and not subject to review by any court. 22 U. S. Code § 1641(m), 22 U. S. Code

1623(h). The above-entitled decisions sustain the constitutionality and binding effect of these non-reviewability proscriptions.

In *DeVegiar* v. *Gilliland, supra*, this Court assumed for purposes of argument that the non-reviewability provision would probably not prevent judicial relief in a situation where a claimant is denied consideration by reason of his race, creed or color. No such contention is made in the instant case.

A motion to affirm lies where dismissal of a complaint below is plainly correct. *Rooker* v. *Fidelity Trust Company*, 263 U. S. 413 (1923). For the reasons stated above, the trial court was correct in dismissing the complaint.

Wherefore, it is respectfully submitted, the judgment be affirmed or the instant appeal be dismissed.

/s/ OLIVER GASCH
OLIVER GASCH,
United States Attorney.

/s/ CARL W. BELCHER
CARL W. BELCHER,
Assistant United States Attorney.

/s/ DONALD S. SMITH
DONALD S. SMITH,
Assistant United States Attorney.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been mailed to attorney for appellant, John Wattawa, Esquire, 1317 F Street, N. W., Washington 4, D. C., this 7th day of October, 1959.

/s/ DONALD S. SMITH
DONALD S. SMITH,
Assistant United States Attorney.

*Appendix.*

## Petitioner's Objections to Appellee's Motion.

UNITED STATES COURT OF APPEALS,

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 15,254

LENA S. TILLMAN, Administratrix,
Appellant,

*v.*

ROBERT B. ANDERSON, Secretary of the Treasury, et al.,
Appellees.

OBJECTIONS TO MOTION TO AFFIRM OR DISMISS

Comes now Appellant Lena S. Tillman, Administratrix, and makes the following Objections to the Motion by Appellee Robert B. Anderson, Secretary of the Treasury, to affirm or dismiss:

I

THE MOTION LACKS PROCEDURAL AUTHORITY

Appellee cites no Rule or ruling of this Court as authority for this Motion, and no Rule or authority therefor appears among the Court's General Rules.

The Order of the District Court dismissing the Complaint is a final Order (J. App. 49), and the prosecution of an appeal therefrom to this Court is permitted by law, on compliance with the requirements of Federal Rule of Civil Procedure 73, and of this Court's Rule 15; all of which requirements Appellant fulfilled.

*Appendix.*

This Court's Rule 19, Oral Argument, provides that an appellant shall be entitled to open and close the case.

Disposition of an appeal under the existing circumstances in the manner sought by Appellee's Motion is nowhere authorized by applicable Rules, and the Motion should not receive consideration.

## II

### The Motion Is Not Timely

Appellant filed the original record herein on July 10, 1959, the attorney below for defendants (Appellees) being then so notified by the Clerk.

On July 20, 1959, Appellant filed Appellant's Statement of Points, and also Statement of Parts of the Record Appellant Proposes to Print in the Joint Appendix, after copies thereof had been served by Appellant on the attorney below for defendants.

On August 3, 1959, Harry T. Alexander, Esq., Assistant United States Attorney, called Appellant's attorney on the telephone, and advised that Appellant's designation of the material to be printed in the Joint Appendix was satisfactory to the United States Attorney's office.

On August 13, 1959, Appellant filed Motion, after serving copy on the attorney below for defendants, to extend to and including September 18, 1959, the time to file Brief for Appellant herein, which Motion was granted on August 24, 1959, no objection thereto having been indicated.

Thereafter, on September 18, 1959, 25 copies of Brief for Appellant and Joint Appendix were filed herein, together with certificate of service of copies upon said attorney below.

The pending Motion, singly by Appellee Robert B. Anderson to Affirm or Dismiss, was filed herein on October 7, 1959, and appearances for Appellees simultaneously en-

tered, approximately three months after the original record had been filed.

In addition to her expense for cost bond on appeal, and for the filing fee herein, Appellant incurred, and on October 19, 1959 paid, $268.06 for printing the required Brief for Appellant and Joint Appendix.

Accordingly Appellee's Motion is not timely, or conscionable.

## Appellee Misconceives The Issues

The District Court dismissed the Complaint on the ground that it lacked jurisdiction over the subject matter of the cause (J. App. 49), a question on which Appellee's Motion is silent.

The true claims of Appellant, and the real issues on the appeal, are set out in Brief for Appellant, namely Statement of Questions Presented (i), Statement of Points (13), Summary of Argument (14, 15), and Argument (16-30).

Moreover, the decisions cited in Appellee's Motion are inapplicable.

In *First National City Bank of New York* v. *Gilfillan, et al.*, 103 U. S. App. D. C. 219, 257 F. 2d 223 (1958), the claim had been absolutely assigned to one Grant, a resident of New York but a national of Great Britain. In its decision denying the claim, the Commission pointed out that the warrant of attachment had not been issued in favor of a national of the United States, and that a lien had not been obtained by a national of the United States pursuant to the attachment and judgment. On its above appeal the Bank contended that since it was the "beneficial owner" of the claim held by Grant, the attachment and the lien were "in its favor", and the Statute satisfied. This Court remarked that the Commission did not find that the Bank was the beneficial owner, but apparently intended

to hold that even if it were such, still because the attachment and judgment and lien had been obtained by Grant, the conditions of the Statute were not satisfied. The Court added that Congress could have expressly disqualified *beneficiaries of oral trusts* from the benefits of the Statute, and that if its delegate with unreviewable power denies those benefits to such persons, it has not violated the Constitution, and also found that limitations had run against the claim. In the instant matter, Appellant's decedent was at all times concerned, namely from 1916 until his death in 1950, a citizen of the United States. He was not a beneficial owner of the claim or a beneficiary of an oral trust, but always its true and actual owner, and there is moreover no valid limitations issue.

In *American and European Agencies, Inc.* v. *Gilliland*, 101 U. S. App. D. C. 247 F. 2d 95, this Court (Circuit Judge Miller dissenting) held that the bar of judicial relief contained in the International Claims Settlement Act of 1949 (22 U. S. C. A., Sections 1622-1627) precluded the claimant from maintaining action upon the contention that it was not accorded the type of hearing provided by Statute, which was a question of law not subject to judicial review where claimant had been denied no Constitutional rights in the hearing.

In *DeVegvar* v. *Gilliland et al.*, 97 U. S. App. D. C. 125, 228 F. 2d 640, this Court (Circuit Judge Miller dissenting) in affirming the dismissal of the Complaint, stated (128):

> "No doubt the provisions of Section 4(d) [of aforesaid International Claims Settlement Act of 1949] do not bar certain types of judicial action. * * * No violation of Constitutional right is suggested here: plaintiff-appellant makes no contention, for example, that the United States has taken her property without paying for it. What happened was that Yugo-Slavia took plaintiff's property."

*Appendix.*

CONCLUSION

Accordingly, Appellee's Motion to Affirm or Dismiss should be denied, and the appeal allowed to proceed to determination on its issues.

Respectfully submitted,

JOHN WATTAWA,
JOHN WATTAWA,
1317 F Street, N.W.,
Washington 4, D. C.,
Attorney for Appellant.

BORRIS M. KOMAR,
BORRIS M. KOMAR,
349 East 49th Street,
New York 17, N. Y.

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CERTIFICATE OF SERVICE

Copy of the foregoing Objections delivered by hand this 15th day of October, 1959, to Donald S. Smith, Esq., Assistant United States Attorney, United States Court House, Washington 1, D. C., attorney for Appellee Robert B. Anderson.

JOHN WATTAWA,
JOHN WATTAWA.

*Appendix.*

## Order Dismissing Appeal.

UNITED STATES COURT OF APPEALS,

FOR THE DISTRICT OF COLUM. CIRCUIT.

September Term, 1959

No. 15,254.

---

LENA S. TILLMAN, Administratrix of the Estate of James A. Tillman, Deceased,

Appellant,

*v.*

ROBERT B. ANDERSON, Secretary of the Treasury, et al.,

Appellees.

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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, JOSEPH W. STEWART, CLERK.

Before: PRETTYMAN, Chief Judge, DANAHER and BASTIAN, Circuit Judges, in Chambers.

ORDER

Upon consideration of appellees' motion to affirm or dismiss and of appellant's objections, it is

ORDERED by the Court that the judgment of the District Court on appeal herein is affirmed.

Per Curiam.

Dated, October 30, 1959.

*Appendix.*

## Appellant's Motion for Reconsideration.

UNITED STATES COURT OF APPEALS,

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

September Term, 1959

No. 15,254

---

LENA S. TILLMAN, Administratrix of the Estate of James A. Tillman, Deceased,

Appellant,

*v.*

ROBERT B. ANDERSON, Secretary of the Treasury, et al.,

Appellees.

---

MOTION FOR RECONSIDERATION

Comes now appellant, Lena S. Tillman, and under the Court's Rule 31 moves for reconsideration of appellees' Motion to Affirm or Dismiss, subject to the Court's Order herein dated October 30, 1959, and respectfully shows:

1. The sole procedural authority cited by appellees for their Motion is "*Rooker* v. *Fidelity Trust Company*, 263 U. S. 413 (1923)". But that authority is wholly inapplicable, because as shown from the Report, that cause was submitted on motion to dismiss or affirm. There has been no such submission here.

2. It is provided in Section 46(c), Chapter 3 (Courts of Appeals), Title 28, *United States Code*, that "Cases and

controversies shall be heard and determined by a court or division of not more than three judges. * * *" The granting of appellees' Motion to Dismiss or Affirm denies appellant the right to be heard.

3. Paragraph (a) of this Court's Rule 19, Oral Argument, states that an appellant shall be entitled to open and conclude the case. And the Rules of this Court have the force and effect of law. *Bradley* v. *Pace*, 87 U. S. App. D. C. 11, 183 F. 2d 806.

4. Appellant fulfilled all requirements prescribed by the Federal Rules of Civil Procedure, and by the Rules of this Court, for the maintenance of her appeal, and in the circumstances the denial of a plenary hearing is a denial of due process.

5. There is no authority under the Rules of this Court for such denial.

It is stated under Rule 6, Practice, that except as otherwise provided in the Rules, the practice in this Court shall so far as practicable be the same as in the Supreme Court of the United States. Rule 16 of the Supreme Court relates to Motion to Dismiss or Affirm, but its provisions are inapplicable herein because while they permit the filing of a motion to dismiss or affirm, they require it to be filed within 30 days after receipt of the jurisdictional statement, which in turn, under that Court's Rule 13 is to be filed upon the docketing of the record. Under this Court's Rule 17 (b)(4), the jurisdictional statement awaits the filing of Brief for appellant and is incorporated therein as a part of the same. Moreover, the practice in the Supreme Court as for the matter herein would be governed by the rules relating to the granting of certiorari, while appellant has the right to appeal to this Court upon fulfillment of the specified procedural and jurisdictional requirements.

6. In *Sparrow* v. *Strong*, 70 U. S. Supreme Court Reports, 49, 50, 3 Wall. 97, 18 L. Ed. 49, the Supreme Court, applicable Court Rule apparently being then absent, had held:

> "And the record shows that the writ has been regularly sued out and returned. This Court, therefore, has jurisdiction, and it has been repeatedly held in similar cases, Minor v. Tillotson, 1 How. 288; Hecker v. Fowler, 1 Black, 95 (66 U. S. XVII, 45) that on a motion to dismiss, the court will look to the regularity of the writ and the fact of jurisdiction. Other questions must, in general, await final hearing."

7. Allowing plenary hearing on some appeals, and summary disposition of others on the merits, where, unlike the Supreme Court practice, no statute or Court rule governing such summary disposition exists for the guidance of the Court and litigants, could lead to practice uncertainties and denial of equal protection under law as guaranteed by the Constitution.

8. This Court's Order herein, dated October 30, 1959, does not indicate the grounds for affirmance. If the Court affirmed because jurisdiction is in the Court of Claims, as appellees alleged below (Brief for Appellant, pp. 18, 19), then appellant may still go there for relief. If the Court affirmed on appellees' defense of Statutes of Limitations (Brief for Appellant, pp. 20-24), it is important for appellant to be so advised in charting further procedural course. If the Court affirmed on the ground that the Commission's decision is unchallengeable even on Constitutional grounds (Brief for Appellant, pp. 24-30), then appellant should also be so advised in charting further procedural course. Appellant's case against appellee Secretary of the Treasury does not depend on the decision rendered by appellee Commission, and clearly raises Constitutional questions.

WHEREFORE, appellant's Motion for Reconsideration should be granted, the Court's Order dated October 30, 1959 vacated, and the appeal allowed to go to plenary hearing.

Respectfully submitted,

JOHN WATTAWA,
John Wattawa,
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Attorney for Lena S. Tillman,
Appellant.

BORRIS M. KOMAR,
Borris M. Komar,
349 East 49th Street,
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Of Counsel.

This Motion is presented in good faith and not for delay.

JOHN WATTAWA,
John Wattawa,
Attorney for Appellant.

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CERTIFICATE OF SERVICE

Copy of the foregoing Motion for Reconsideration delivered by hand this 13th day of November, 1959, to Donald S. Smith, Esq., Assistant United States Attorney, United States Court House, Washington 1, D. C., attorney for appellees.

JOHN WATTAWA
John Wattawa

*Appendix.*

## Order Denying Motion for Reconsideration.

UNITED STATES COURT OF APPEALS,

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

September Term, 1959

No. 15,254.

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LENA S. TILLMAN, Administratrix of the Estate of JAMES A. TILLMAN, Deceased,

Appellant,

*v.*

ROBERT B. ANDERSON, Secretary of the Treasury, *et al.*,

Appellees.

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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Filed Dec. 11, 1959.

JOSEPH W. STEWART, Clerk.

Before: PRETTYMAN, Chief Judge, DANAHER and BASTIAN, Circuit Judges, in Chambers.

ORDER.

Upon consideration of appellant's motion for reconsideration of the order of this Court affirming the judgment of the District Court in this case, it is

*Appendix.*

ORDERED by the court that the motion for reconsideration is denied. See: *DeVegvar* v. *Gillilland, et al.*, 87 U. S. App. D. C. 126, 228 F. 2d 640 (1955), cert. denied, 350 U. S. 994; *Haas* v. *Humphrey*, 100 U. S. App. D. C. 401, 246 F. 2d 682 (1957); *Dayton* v. *Gillilland*, 100 U. S. App. D. C. 75, 242 F. 2d 227 (1957); *American and European Agencies* v. *Gillilland, et al.*, 101 U. S. App. D. C. 104, 247 F. 2d 95 (1957), cert. denied, 355 U. S. 884; *Zutich* v. *Gillilland*, 254 F. 2d 464 (6th Cir. 1958); *First National City Bank* v. *Gillilland, et al.*, 103 U. S. App. D. C. 219, 257 F. 2d 233 (1958).

*Per Curiam.*

Dated, December 11, 1959.